STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2008
v	No. 273058 Wayne Circuit Court
MILTON LEE LEMONS, Defendant-Appellant.	LC No. 06-004818-01

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right following his conviction for felony murder, a violation of MCL 750.316(1)(b). The underlying felony was first-degree child abuse. Defendant was sentenced to a term of life imprisonment without the possibility of parole. For the reasons set forth in this opinion, we affirm.

This appeal arises from the death of defendant's baby daughter, Nakita, on October 11, 2005. Testimony elicited during trial indicated that Nakita was born on July 24, 2005, and with the exception of the baby being allergic to milk, she was a healthy baby. Defendant's wife and the baby's mother, Lori Ann Lemons, testified that on her first day back to work from maternity leave, October 10, 2005, she received a telephone call from husband around 7:00 p.m. indicating that the baby was aspirating and that she needed to come home. When she arrived home, she found paramedics working on the child who was eventually air-lifted to the University of Michigan's Children's Hospital where she died at 6:28 a.m. the following day.

Dr. Bader Casin was the Washtenaw County Medical Examiner who performed an autopsy on the baby on October 11, 2005. During the autopsy, Casin found brain swelling with blood on the brain surfaces as well as in the nerve sheaf of both eyes. These findings were consistent with Shaken Baby Syndrome. He stated that the injuries were not the result of a natural phenomenon and would not have resulted from a fall or being dropped. Casin then testified:

> In other words, it not [sic] a sudden jerk motion. It's not a sudden impact motion such as falling off a couch onto a floor. That sort of thing, or child falling down; or a drop of a child. It is a repeated back and forth motion. It's the oscillation that causes the skull to move first and then the softer brain slightly following it. And then on the reversal, banging, so to speak, inside.

> That banging has to occur several times before that brain will, first of all, first of all swell. Secondly, bridging veins stretch enough to break to cause hemorrhage under the surface.

Detective John Williams testified that he interviewed defendant following the baby's death. After being read his rights, defendant initially told Williams that he fed the baby and put her to bed. Defendant noticed that the baby was having trouble breathing and he went to his neighbor for help. Williams confronted defendant with the autopsy results and defendant then provided Williams with a hand-written account of what took place. It provided, in relevant part, "On October 10th, 2005, my wife left for work at 2:30 p.m., which I dreaded because I didn't like to be left alone with her. . . . At about 6:20, my son started fussing and then she started crying also. I went into the room to get him out, but picked her up instead. She wouldn't stop crying and he was still crying too. So I shook her three or four times to get her to be quiet. She stopped crying and started spitting up formula, but was unresponsive." Williams then conducted a question-and-answer segment to clarify defendant's statement.

> "Question on a scale of one to ten, ten being shaking her very hard, how hard did you shake Nikita?
>
> Answer, seven.
>
> Question, what was Nikita's head doing as you shook her.
>
> Answer, back and forth. I went blank. I just wanted her to stop crying. . . .
>
> Question, how did you feel when you were shaking her?
>
> Answer, very angry, depressed. It was a combination of things. . . .
>
> Question, did you intend to kill Nikita.
>
> Answer, no, not at all.
>
> Question, what did you intend to do when you shook her?
>
> Answer, to quiet her up.
>
> Question, do you know shaking an infant can be fatal.
>
> Answer, yes. I've seen it on TV and heard about it."

***

Following a bench trial, the trial court found defendant guilty of felony murder and sentenced him to life without parole. Defendant now appeals as of right.

On appeal, defendant first argues that the trial court erred in denying defendant's motion to quash the information. He contends that the prosecution failed to introduce evidence to show

probable cause to believe that the crime charged was committed and probable cause to believe that defendant committed the crime.

A magistrate's decision to bind over a defendant based on the factual sufficiency of the evidence is reviewed for an abuse of discretion. *People v Schaefer*, 473 Mich 418, 427; 703 NW2d 774 (2005), modified on other grounds, *People v Derror*, 475 Mich 316, 320 (2006). Thus, in reviewing a magistrate's decision to bind over a defendant for trial, a circuit court must consider the entire record of the preliminary examination. It may not substitute its judgment for that of the magistrate, and may reverse only if it appears on the record that the magistrate abused his discretion. *People v McKinley*, 255 Mich App 20, 25; 661 NW2d 599 (2003); *People v Green*, 260 Mich App 710, 713-714; 680 NW2d 477 (2004). Similarly, this Court reviews the decision de novo to determine whether the magistrate abused his discretion. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002). Because appellate review focuses on whether the magistrate abused his discretion, this Court gives no deference to the circuit court's decision. *People v Harlan*, 258 Mich App 137, 145; 669 NW2d 872 (2003).

We conclude that defendant was properly bound over for trial following the preliminary examination.

The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. *People v Glass (After Remand)*, 464 Mich 266, 277; 627 NW2d 261 (2001); *People v Hill*, 269 Mich App 505, 514; 715 NW2d 301, lv den 477 Mich 897 (2006). Probable cause that the defendant has committed the crime is established by evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt. *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003). To establish that a crime has been committed, a prosecutor need not prove each element beyond a reasonable doubt, but must present some evidence of each element. *Yost, supra* at 126; *People v Hill*, 433 Mich 464, 469; 446 NW2d 140 (1989); *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21, lv den 456 Mich 864 (1997). Circumstantial evidence and reasonable inferences from the evidence can be sufficient. *People v Greene*, 255 Mich App 426, 444; 661 NW2d 616 (2003). In determining whether the crime has been established, the magistrate is not limited to determining whether evidence on each element has been presented. Rather, the magistrate must make a determination after an examination of the whole matter. *People v Stafford*, 434 Mich 125, 133; 450 NW2d 559 (1990); *People v Carter*, 250 Mich App 510, 521; 655 NW2d 236 (2002). Although the magistrate may weigh the credibility of the witnesses, if the evidence conflicts or raises a reasonable doubt, the defendant should be bound over for resolution of the questions by the trier of fact. *Yost, supra* at 128; *People v Goecke*, 457 Mich 442, 469-470; 579 NW2d 868 (1998) habeas corpus dis'd 8 Fed Appx 558 (CA 6, 2001); *Greene, supra* at 444.

During the hearing on defendant's motion to quash, both parties cited *People v Maynor*, 470 Mich 289; 683 NW2d 565 (2004). In *Maynor*, the Michigan Supreme Court held that the statute "requires the prosecution to establish, and the jury to be instructed that to convict it must find, not only that defendant intended to commit the act, but also that defendant intended to cause serious physical harm or knew that serious physical harm would be caused by her act." *Maynor, supra* at 291. The defendant in that case was charged with felony murder after she left her children in a hot car for over three hours while visiting a beauty salon. The children died of hyperthermia related to heat exposure. *Id.* at 292. The magistrate refused to bind the defendant

over on felony murder charges because the underlying felony, first-degree child abuse, was a specific intent crime and the unrefuted evidence was that the defendant did not intend to harm the children. *Id.* at 293. The Michigan Supreme Court rejected the need to categorize the crime as specific or general intent by stating:

> The plain language of the statute requires that to be convicted of first-degree child abuse, a person "knowingly or intentionally causes serious physical harm or serious mental harm to a child." The phrase "knowingly or intentionally" modifies the phrase "causes serious physical or serious mental harm to a child." Thus, this language requires more from defendant than an intent to commit an act. The prosecution must prove that by leaving her children in the car, the defendant intended to cause serious physical or mental harm to the children or that she knew that serious mental or physical harm would be caused by leaving them in the car. [*Id.* at 295.]

Defendant argues that, although he admitted to shaking the baby, he only meant to "quiet her down" and he did not intend to harm her. He claims that absent a showing that he intended to harm the baby, there could be no first-degree child abuse. However, *Maynor* demonstrates that defendant need only have intended the act of shaking with the knowledge that serious physical harm may result. Defendant admitted to police that, on a scale of one to ten, he shook the baby at "a seven." The testimony clearly revealed that defendant knew shaking a baby could result in death by his statement to the investigating officer that he had seen "such things on television." Also, defendant was a nurse's assistant and understood the consequences of his behavior. This evidence, coupled with the evidence provided by the investigating officer, the defendant's mother and neighbor, provided more than sufficient evidence to bind defendant over on a charge of felony murder with the underlying felony being first-degree child abuse.

Defendant next argues that the evidence at trial was insufficient to find defendant guilty of felony murder. Defendant argues that the prosecution had to show that by shaking the baby, defendant intended to cause serious physical harm to the baby, however, according to defendant, all the evidence demonstrated was that defendant intended only "to quiet her up."

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000), lv den after rem 469 Mich 1004 (2004).

We conclude that the State produced sufficient evidence to convict defendant of felony murder.

MCL 750.316(1)(b), the felony murder statute, provides, in pertinent part:

> (1) A person who commits any of the following is guilty of first degree murder and shall be punished by imprisonment for life:
>
> * * *

> (b) Murder committed in the perpetration of, or attempt to perpetrate, arson, criminal sexual conduct in the first, second, or third degree, child abuse in the first degree, a major controlled substance offense, robbery, carjacking, breaking and entering of a dwelling, home invasion in the first or second degree, larceny of any kind, extortion, kidnapping, vulnerable adult abuse in the first and second degree under section 145n, torture under section 85, or aggravated stalking under section 411i.

Defendant was charged with first-degree felony murder, with the underlying felony being first-degree child abuse. The child abuse statute, MCL 750.136b(2) provides that, "a person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child."

Defendant argues that the prosecution failed to show that he intended to harm the child. However, it is for the trier of fact to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), lv den 430 Mich 863 (1988); *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987), lv den 430 Mich 854 (1988), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2006). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130, reh den 461 Mich 1205 (1999); *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004), lv den 471 Mich 927 (2004).

The defendant in *People v Gould*, 225 Mich App 79; 570 NW2d 140 (1997) lv den 459 Mich 955 (1999), made a similar argument when he claimed that the trial court should have granted his motion for a directed verdict on a charge of first-degree child abuse. *Gould*, *supra* at 82. Although the child in *Gould* did not die, he did suffer serious injury as a result of being shaken. This Court held that, even if the first-degree child abuse statute was considered a specific intent crime, there was sufficient evidence to allow the jury to consider the charge. This Court went on to state:

> Even though the prosecutor did not specifically argue that defendant intended to injure the victim, we believe that defendant's intent to physically injure the victim could be inferred from his actions. Defendant, a trained EMT, admitted shaking the two-month-old victim and admitted that he knew it was improper to shake a baby. The victim was shaken on more than one occasion. As a result of being shaken, the victim suffered serious physical harm. From this evidence it could be inferred that defendant intended to harm the victim. Hence, although the trial court erred in holding that first-degree child abuse was a general intent crime, the trial court properly denied defendant's motion for a directed verdict on the charge of first-degree child abuse because evidence was presented from which it could be inferred that defendant intended to harm the victim. [*Id.* at 87-88.]

The facts in *Gould* are similar to facts in this case. Defendant admitted that he shook the child and he also knew that shaking a baby could result in serious injury or death. Defendant

also had medical training as a nursing assistant. Defendant was admittedly angry and frustrated when he shook the baby. From these circumstances, the trier of fact could have reasonably inferred that defendant meant to harm the child. *Maynor*, *supra.*

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher